2012 IL App (2d) 101327-U
No. 2-10-1327
Order filed June 21, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 02-CF-1237
KEVEN L. CARTER,	)	Honorable Gary V. Pumilia,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

Held: The trial court properly summarily dismissed defendant's postconviction petition as frivolous, as the State's mere question whether the court was finding the petition frivolous, having previously found the petition moot because defendant had completed his sentence, did not constitute improper input; thus, we did not need to address whether the court properly found the petition moot.

¶ 1 The issue raised in this appeal is whether the summary dismissal of the postconviction petition filed by defendant, Keven L. Carter, was proper. We determine that it was. Accordingly, we affirm.

¶ 2 Following a jury trial, defendant was convicted of attempted aggravated criminal sexual assault (720 ILCS 5/8-4(a), 12-14(a)(2) (West 2002)), and he was sentenced to 13 years' imprisonment. Throughout his incarceration, defendant filed numerous pleadings. On June 7, 2010, he filed a motion for leave to file a successive postconviction petition.

¶ 3 The trial court granted defendant's motion, and defendant filed his petition on September 9, 2010, while he was serving his period of mandatory supervised release (MSR). In his petition, defendant essentially argued that he was not fit to stand trial, the evidence was insufficient to establish his guilt beyond a reasonable doubt, and his trial counsel was ineffective for failing to address these issues at trial.

¶ 4 On December 3, 2010, the trial court summarily dismissed defendant's petition, ruling that defendant had served his MSR term and, thus, the court could not grant defendant any relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). The trial court also found, after the State indicated that "nothing [it] state[d] *** is intended to influence the Court in [deciding whether the petition should be summarily dismissed]," that the petition was frivolous and patently without merit. Specifically, the following exchange was had:

> "MR. BIAGI [Assistant State's Attorney]: And does the Court find it frivolous, as well?
>
> THE COURT: Yes, it is frivolous.
>
> MR. BIAGI: All right.
>
> THE COURT: It's wholly without merit."

¶ 5 After the court reiterated its finding that the issues defendant raised were moot, as defendant had been released from custody, the court, without any input from the State, again asserted that defendant's petition was frivolous and patently without merit. Specifically, the court stated:

> "It's wholly frivolous, without merit. But, even if I thought there was merit to it, I couldn't grant relief [under the Act, as the issues defendant raises became moot once defendant was released from custody]."

¶ 6 Like its oral ruling, the trial court's written order reflects that the court summarily dismissed the petition because the issues were moot and the petition was frivolous and patently without merit. Specifically, in the written order, the court found that "[t]he entire petition is frivolous and patently without merit" and that "[t]he remedies under the *** Act [citation] are not available to persons who have served their sentence." Based on these findings, the written order provides that "[defendant's] petition is dismissed pursuant to 725 ILCS 5/122-2.1 [(West 2010)] as frivolous and patently without merit." The written order then indicates that "[t]he petition is also independently dismissed [on the basis that the issues are moot.]" Defendant timely appeals from that dismissal.

¶ 7 The Act provides a remedy to defendants who have suffered substantial violations of their constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). When the death penalty is not involved, there are three stages to proceedings under the Act. *Id.* at 244. Defendant's petition was dismissed at the first such stage.

¶ 8 At the first stage, the trial court independently reviews the petition within 90 days of its filing and determines whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010); *Edwards*, 197 Ill. 2d at 244. If the court finds that the petition is frivolous or patently without merit, the court may summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2010); *People*

v. Hansen, 2011 IL App (2d) 081226, ¶ 18. We review *de novo* the summary dismissal of a petition. *People v. Barcik*, 365 Ill. App. 3d 183, 190 (2006).

¶ 9 Defendant argues that the summary dismissal of his petition was improper for two reasons. Specifically, defendant claims that (1) he had standing to bring his claims under the Act because, when he filed the petition, he was serving his term of MSR; and (2) the court's finding that his petition was frivolous and patently without merit could not serve as a proper basis for summarily dismissing his petition, as that finding was "the result of impermissible prodding, in the form of leading questions and suggestive comments[,] from the State."[1]

¶ 10 In addressing these claims, we first consider whether the trial court's frivolous finding was improper because it was based on improper or impermissible input from the State. As noted above, the trial court must independently review a petition within 90 days of its filing and determine from that independent review whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010); *Edwards*, 197 Ill. 2d at 244. An independent review of the petition means that the court may not consider at the first stage any further pleadings by the defendant or responsive pleadings from the State. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). This is not to say, however, that whenever there is any further input from, in particular, the State, the summary dismissal of a defendant's petition is automatically rendered improper. See *id.* at 419 ("The mere early filing of a motion or responsive pleading by the State, however, does not *per se* contaminate

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[1]Defendant makes no argument on appeal concerning the merits of his petition. That is, defendant does not assert that the summary dismissal of his petition was improper because he stated the "gist" of a constitutional violation. See *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 11.

the circuit court's determination [at the first stage].”). “Rather, reversal [of a summary dismissal] is required where the record shows that the circuit court sought or relied on input from the State when determining whether the petition is frivolous.” *Id.* Factors that may indicate that the State provided improper input on which the trial court relied include, but are not limited to, the fact that a hearing was held at the first stage, that the court indicated that it relied on the State's request for summary dismissal, and that the court's summary dismissal order mirrored the factual and legal reasons for dismissal that the State advanced. *Id.* at 422.

¶ 11 Here, the State asked, “And does the Court find [the petition] frivolous, as well?” We determine that, even if this mere question could be construed as a motion to dismiss, this “motion” did not amount to improper input on which the trial court relied or by which the trial court was influenced. Specifically, the record reflects that, in response to this “motion,” the court found the petition frivolous and patently without merit without holding a hearing. Moreover, in finding the petition frivolous and patently without merit, the court did not indicate that it was doing so only on the State's request. Further, the court did not state that the frivolous finding was based on any reason for summary dismissal that the State advanced. In fact, the record establishes that the State did not advance *any* basis to dismiss defendant's petition.

¶ 12 Defendant claims that the State's question constituted “impermissible prodding.” We disagree. Simply put, if the rote motion to dismiss at issue in *Gaultney*, which motion was short, contained “ ‘boilerplate' language,” and did not discuss any of the facts in the case, did not qualify as improper input from the State (*id.* at 415, 419-20), then we fail to see how the State's meager question here, where the court could have answered in any of a number of ways, qualified as

improper input. Given the holding in *Gaultney* and the fact that defendant makes no claim concerning the merits of his petition, we affirm the summary dismissal of defendant's petition.

¶ 13 However, as an aside, we briefly comment on the State's suggestion, based on *People v. Henderson*, 2011 IL App (1st) 090923, that we can affirm the summary dismissal on the basis that defendant's postconviction claims became moot once he completed his MSR term. Although the first district reached that result in *Henderson* (see *id.* ¶ 15), another division of that court has reached the opposite result (see *People v. Jones*, 2012 IL App (1st) 093180, ¶¶ 3, 10). Resolving the conflict created by *Henderson* and *Jones* can wait for another day. Because we affirm on the basis that the trial court independently found defendant's petition frivolous, we need not address whether the petition was also moot.

¶ 14 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 15 Affirmed.